22-7454

Docket No. _____

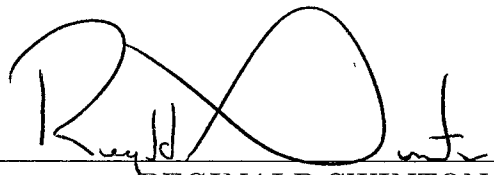
In THE

United States Supreme Court

In re., REGINALD SWINTON, Petitioner,

ON PETITION FOR WRIT OF HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS



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QUESTIONS PRESENTED

Is the Circuit Court's order in deciding sua sponte to issue its Mandate denying relief without first having afforded petitioner prior notification and a meaningful opportunity to hear his explanation in refutation dismissing the second/successive habeas application an abuse of discretion, contrary to or an unreasonable application of clearly established statutory, and case law from this Court?

Did appellate counsel render ineffective representation in failing to present unreasonably the significant and obvious issues on the first-tier appeal as of right?

LIST OF PARTIES

[XX] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Swinton v. Fogg, ___ F. Supp. 3d ____ (S.D.N.Y., September 19, 2016) (VSB) (15-Civ-2821) (U)—Appendix "I".

People v. Swinton, ___ A.D.3d. ____, (1st Dept., February 8, 2022) Appendix "J"

People v. Swinton, ___ A.D.3d. ____, 2013 NY Slip Op. 92467, M-1313 (1st Dept., January 21, 2013), Appendix "J"

People v. Swinton, ___ Misc. 3d. ____, (Sup. Ct., Bx. Cty. April 30, 2019), (Lieb., J.), (U), Appendix "P".

People v. Swinton, 19 Misc. 3d 247, (Supr. Ct., Bx. Cty., February 7, 2008), (Dawson, J.), Appendix "P".

CERTIFICATION STATEMENT

I, REGINALD SWINTON, CERTIFY THAT THE Petition for an Extraordinary Writ:

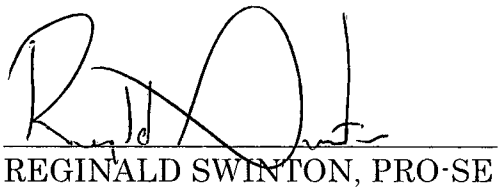
The approximate word count, inclusive of footnoted entries is 6, 165 words.

The Word processor use in the preparation of the petition is "Word 97"

The typeface used is New Century Schoolbook

The point size of the typeset is 12 points

The spacing between lines is doubled spaced.



REGINALD SWINTON, PRO-SE

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a writ of habeas corpus issue.

OPINION BELOW

[XX] For cases from state courts:

The Opinion of the highest state court to review the merits appears at Appendix "G" to the petition and is

[XX] reported at 52 AD. 2D 1098, lv. den., 39 N.Y. 2d 1066

[ ] has been designated for publication but is not yet reported; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

TABLE OF AUTHORITIES CITED

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CASES:

STATUTES AND RULES:

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OTHER:

JURISDICTION

[XX] For cases from state courts:

The date on which the highest state court decided my case was July 8, 1976

[ ] A timely petition for rehearing was thereafter denied on the following date n/a, and a copy of the order denying rehearing appears at Appendix **n/a**.

[ ] An extension of time to file the petition for a writ of certiorari was Granted to and including **n/a** (date) on **n/a**.

(date) in Application No. **n/a** A **n/a**.

The jurisdiction of this Court is invoked under 28 U.S.C., §§ 1257(a); 2241.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal

U.S. Const., 14th Amendment, (Due Process Clause)

U.S. Const., 6th Amendment, (Effective Assistance of Counsel)

28 U.S.C., § 2241

28 U.S.C., § 2242

28 U.S.C., § 2244

28 U.S.C., § 2254

28 U.S.C., Rule 60(b)

U.S. Sup. Ct. Rule, Rule 20.4

State

N.Y. Const., Art. II, § 12

N.Y. Penal Law, § 70.02

N.Y. Penal Law, § 70.04

N.Y. Penal Law, § 70.08

N.Y. Penal Law., § 70.25

N.Y. Penal Law., § 70.30

N.Y. Penal Law., § 70.35

N.Y. Criminal Procedure Law, § 220.50

N.Y. Criminal Procedure Law, § 220.60

N.Y. Criminal Procedure Law, § 710.10

N.Y. Criminal Procedure Law, § 710.20

STATEMENT OF THE CASE

1. The guilty plea judgment of conviction, sentence, commitment, imprisonment, and restraint of petitioner is involuntary and without due process of law, in violation of the Sixth and Fourteenth Amendment of the Constitution of the United States by reason of the following facts:

   a. *The Appellate Brief*

2. The appeal herein was submitted by attorney Stephen Hyman. [1] In the perfection and filing of the brief to the appellate court, he did not correspond or discuss previously with petitioner the issue(s) to be submitted; nor sought petitioner's input or provided him an opportunity to preview or comment on the issues presented prior to its submission. Counsel raised the following issue:

Point I

APPELLANT'S PLEA OF GUILTY WAS NOT VOLUNTARILY MADE AND IT WAS ERROR FOR THE COURT TO DENY THE MOTION TO WITHDRAW THE PLEA

3. a. The Trial Court erred in denying appellant's and counsel's motion for relief of counsel.

4. b. The denial of the motion to relieve counsel presented appellant with a dilemma that had no satisfactory resolution and thus was coercion.

5. Counsel argued petitioner's guilty plea is the product of coercion in violation of defendant's constitutional rights due to the unreasonable denial by the trial court in not permitting the substitution and retainment of new counsel of petitioner's choice on the eve of jury selection. According to appellate counsel petitioner is left

[1] New or interning attorney Jane Deusteuh argued the claim orally before the appellate court.

with no choice but to enter a guilty plea against his will, rather than to go to a jury trial facing a number of serious felonies with an attorney he did not trust and wanted to substitute. An attorney who, himself, stated he was not prepared, did not trust himself to try the case meaningfully, and who independently moved to be relieved due to mutual mistrust and irreconcilable differences between him and the petitioner. Respondent's brief argued in opposition. Appendix "F". The appellate courts denied relief without opinion. Appendix "G".

6. Omitted is the significant and obvious constitutional violation rendering the guilty plea involuntary regarding former trial counsel's waiver of petitioner's statutory right or privilege without petitioner's prior knowledge or consent (either verbally or in writing on the record), a waiver which is a direct consequence of the guilty plea being accepted by the trial court, who failed to inform petitioner of such direct consequence during the plea allocution, and who former trial counsel failed to object to the Court's omission, before accepting the guilty plea; and the failure of trial court at sentencing to lawfully consider petitioner for such statutory right or privilege upon a timely request by the petitioner, an issue newly retained counsel who represented petitioner at sentencing and on appeal stated would be raised for consideration on appeal but was not. See, Appendix "J".

REASON FOR GRANTING RELIEF

7. To the Honorable Sonia Sotomayor, Justice of the United States Supreme Court:

8. Reginald Swinton, petitioner, respectfully petitions this honorable court pursuant to 28 U.S.C., § 2241 for a Writ of Habeas Corpus. In support of his petition, your petitioner states as follows:

9. This Honorable Court has jurisdiction pursuant to 28 U.S.C, § 2241 (a), (c)(1) and (3); the Right to the Assistance of Counsel Clause; and Due Process Clause of the Fourteenth and Sixth Amendment to the United States Constitution, to conduct a habeas review of the State's conviction because constitutional violations occurred, centered around the egregious behavior of petitioner's former counsels, which rose to the level of ineffective assistance of counsel, frustrating petitioner's right to bring this original petition for a writ of habeas corpus initially. See, 28 U.S.C, § 2242; N.Y. Const., Art. II, § 12.

10. The Court also has jurisdiction to review whether inadequate and faulty legal representation denied petitioner the right to the effective assistance of counsel on a first-tier appeal in violation of the Sixth Amendment to the United States Constitution.

11. Petitioner is a citizen of the United States and a resident of the States of New York, where petitioner has resided for 67 years.

12. Petitioner is now in the custody of the Superintendent of the Sullivan Correction Facility, which is within the jurisdiction of this court.

13. The authority by virtue of which petitioner is restrained of his liberty is a judgment of conviction of the Supreme Court, County of the Bronx, of the State of New York, entered on September 5, 1975, and a commitment issued under that judgment.

14. The judgment and commitment was based upon an indictment, and guilty plea judgment of conviction of Attempted Rape in the First degree, and on other legal proceedings arising out of the guilty plea of petitioner; true and correct copies of the papers filed as part of the legal proceedings referred to, viz.: indictment, guilty plea proceeding, withdrawal of guilty plea proceeding, sentencing and resentencing proceedings, parties appellate briefs and decision from the first habeas petition, is filed herewith, and by reference made part of this petition. Petitioner's imprisonment is a denial of due process of law under the Sixth and Fourteenth Amendments of the Constitution of the United States, and New York State's Constitution and Penal and Criminal Procedure laws. The court rendering and issuing the commitment was without jurisdiction to do so, in that it entered into, supported and accepted an involuntary guilty plea. See, Appendix "A"-"G".

15. Petitioner has exhausted all remedies available to him in the State courts, and there is no remaining state corrective process or procedure available to petitioner within the contemplation of Title 28, United States Code, Section 2254.

16. The initial application for a writ of habeas corpus is denied in a written but unpublished opinion by the Honorable Vincent L. Broderick of the Southern District Court on January 8, 1978. Swinton v. Fogg, 77-Civ-2532. Appendix "H".

A subsequent Rule 60(b) motion is denied in a written but unpublished opinion by the Honorable Vernon S. Broderick of the Southern District Court on September 19, 2016. Swinton v. Fogg, (15-Civ-2821). Appendix "I".

17. Before the State Courts, petitioner on April 27, 2007, moved pursuant to the State's Criminal Procedure Law, (CPL), Article 440 to set aside the judgment and sentence. The Honorable Joseph J. Dawson denied relief on February 7, 2008, in a written opinion. People v. Swinton, 19 Misc. 3d 247. Both the Appellate Division and Court of Appeals denied leave to appeal. A subsequent post-conviction motion is denied by the Honorable Judith Lieb in a written but unpublished opinion on April 30, 2019, with notice received by petitioner on October 9, 2020. People v. Swinton, -- Misc. 3d – (Sup. Ct., Bronx Cty); lv. den., -- A.D.3d — (1st Dept., May 25, 2021), again, appellate notice being received by petitioner on December 28, 2021 (App. No. 2012-01644, Motion No. 2020-3750). Appendix "P".

18. A writ of error coram nobis is filed on September 1, 2011 but is denied without opinion on January 21, 2013. People v. Swinton, 2013 N.Y. Slip Op. 92467(U), (#M-1313). The Court of Appeals denied leave on February 20, 2014. People v. Swinton, 22 N.Y. 3d 1141. The present petition for a writ of error coram nobis was made to the Appellate Division on September 8, 2021 but is denied without opinion on February 8, 2022; again, petitioner is not notified until June 29, 2022. Leave to appeal is denied by the Court of Appeals and received on October 11, 2022. Appendix "J".

19. The detention and restraint of the petitioner is unlawful and unconstitutional, in that the conviction and sentence on which it was based was obtained and is maintained in violation of the Right to Effective Assistance of Counsel under the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment to the Constitution since petitioner was denied the effective assistance of trial and appellate counsel on his first-tier, direct appeal, which could not lawfully be presented in his first habeas petition due to some objective factor external to the defense by the State impeding efforts to raise the claim in state court; the fact that this Court had not yet "clearly established" the constitutional standard for an Ineffective Assistance of Counsel claim; and the reasonable unavailability of the factual or legal basis for the claim until former appellate counsel made the state records accessible to petitioner 31 years later.

20. The knowing acceptance of an involuntary guilty plea by the State of New York, through its district attorney and his assistants, and the court, constituted such misuse and abuse of the process and procedure of the trial court, as under the color of due process and procedure, in fact and in law to deprive your petitioner of his liberty without due process of law in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States.

21. At the time the guilty plea was offered and entered into, the evidence of the involuntary nature of the guilty plea was known by all but withheld from petitioner by the first retained attorney, the court and prosecuting assistant. Your petitioner could not have by reasonable diligence been able to discover and present

the denial by the trial court at the guilty plea's motion to be withdrawn, or the unconstitutional claim herein prior to or at the state appellate courts, as will hereafter more specifically appear.

22. As such, the reasonable unavailability of the facts and law in support of the omitted claim was not made available until 2007, when appellate counsel finally responded to petitioner's many correspondences made over the years, making available the state records; upon which, petitioner diligently sought to redress the matter through the state courts, which were not addressed or determined by the courts, until all adequate state, legal forums were exhausted.

23. Under the Constitution and laws of the State of New York in 1976, the state courts had no acceptable standard, procedure or forum available for raising an Ineffective Assistance of Counsel, (IAC), claims against counsel on appeal as clearly established by the Supreme Court, There was no clearly identified, State, codified jurisdiction and power to consider such claims on direct appeal from the judgment and sentence imposed by the Bronx county Supreme Court judge at the time.

24. As a result of the suppression and concealment of such involuntary guilty plea evidence by the State of New York, through its district attorney, his assistants, the court and formerly retained counsel in initiating and accepting an involuntary guilty plea, and the denial of any acceptable standard, procedure or judicial forum by which such IAC on appeal claim can be heard and determined by any court of the State, petitioner was deprived and continues to be deprived of his liberty

without due process of law in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States.

25. In 1977, your petitioner filed in the United States District Court for the Southern District of New York, a petition for a writ of habeas corpus based on the afore-mentioned grounds contained in petitioner's state appeal brief. On January 8, 1978, Judge Vincent L. Broderick of the district court denied the petition as presented on the ground the guilty plea was voluntary. A copy of the original opinion of Judge Broderick, and of a further opinion on a subsequent reconsideration request pursuant to Rule 60(b), before Judge Vernon S. Broderick, are attached hereto. Appendix "H", "I". In Judge Vernon S. Broderick's written opinion of September 19, 2016, he dismissed relief "without prejudice" on the substantive claims presented challenging the 1975 conviction, for want of subject-matter jurisdiction based on a lack of custody. Judge Broderick expressly held regarding the substantive claims attacking the 1975 conviction, that:

> The "substantive claims attacking Petitioner's expired 1975 conviction are dismissed without prejudice as beyond the scope of Rule 60(b)."

26. Thereafter, on or about, October 24, 2022, your petitioner sought authorization from the Second Circuit, Court of Appeals for New York, to file a second/successive habeas corpus petition challenging the constitutionality of the 1975 conviction. Appendix "K"; "L". A three-judge panel issued a Mandate on January 20, 2023, *sua sponte*, in a two-page opinion, denied permission to file a second/successive habeas petition on the ground of want of subject-matter jurisdiction because

petitioner is no longer in "custody" on the expired 1975 sentence, and petitioner has not satisfied the requirements for authorization for a second/successive habeas petition.

1. *28 U.S.C., § 2244, and McClesky v. Zant Error*

27. Petitioner filed two motions to the Court and the three-judge panel that determined the second/successive application seeking a recall of the Mandate and suggestion for review en banc on January 19, 2023, and March 7, 2023. The basis for petitioner's complaint was jurisdictional because the decision was contrary to or an unreasonable application of clearly established law as determined by this Court, as well as the Second Circuit's own procedures and case law regarding the due process of law determination of a Second/Successive Habeas petition. In each instance, the Clerk of the Court for the Second Circuit, Court of Appeals for New York, filed but returned the pleadings pursuant to 28 U.S.C., § 2244(b)(3)(E). Appendix "K"; "L"; "M".

28. Petitioner contended the Court's basis for the denial of a second/successive habeas petition on the grounds that the application failed to show on its face a denial of due process of law, due to an alleged want of jurisdiction and failure to satisfy pre, and post-Antiterrorism and Effective Death Penalty Act, (AEDPA), requirements, was an abuse of discretion. The Mandate issued did not adhere to this Court's clearly established procedures, as announced in McClesky v. Zant, 499 U.S. 467 (1991); and Sanders v. United States, 373 U.S. 1 (1963), for the determination of

a second/successive habeas authorization in the Circuit Courts. See, also, 28 U.S.C., § 2244. Id.

i. *Procedural Due Process*

29. Though the Circuit Court may decide to raise an affirmative defense sua sponte that it is considering to deny relief, under the facts and law of this case, such presents a due process of law right of notice and opportunity to be heard issue that required respondent, in all fairness, to meet its burden of raising and establishing with clarity and particularity a claim of abuse of the writ; or the Court provide petitioner prior notice, (on the authorized form issued by the Clerk's Office or follow-up correspondence), that the Court is considering sua sponte denying relief, and affording petitioner an opportunity to be heard in defense of his claim, (on the authorized form issued by the Clerk's Office or follow-up correspondence), particularly in light of the fact that petitioner has made a prima facie case and satisfied all the requirements for authorization of filing a second/successive habeas petition under either a pre, or post AEDPA standard; and in all likelihood, the Court's denial based on a belief of a lack of "actual prejudice" or "custody" , may be no more than a claim that is refutable or excusable, if petitioner had been given prior notice and meaningful opportunity to be heard in defense of his claim. See, e.g., 28 U.S.C., § 2244; McClesky v. Zant, supra; Ethridge v. Bell, 49 F. 4th 674, 682-683 (2nd. Cir., 2022); Lugo v. Keane, 15 F. 3d 29 (2nd Cir., 1994); Appendix "L"; "M".

30. Petitioner alleges that by such error the Judges of the Court of Appeals, and each of them, thereby denied petitioner's due process right to be heard meaningfully for authorization permitting a Second/Successive Habeas petition. The Circuit Court's holdings that the petition for habeas corpus failed to show on its face a denial of due process of law, is in error.

31. However, for the various reasons advanced in support of an abuse of writ claim, it had not satisfied as required the constitutional burden supporting a claim that the application herein, whether under either a Pre-AEDPA or AEDPA governing standard, is a successive petition or an abuse of the writ. See, U.S. Const., Amend. XIV; 28 U.S.C., § 2244(b)(2); 28 U.S.C., § 2254(d); McClesky v. Zant, 499 U.S. 467 (1991); Sanders v. United States, 373 U.S. 1 (1963).

ii. *Statutory Requirements Satisfied*

a. *Retroactive/Intervening Change In Law*

32. Under either governing standard, the application satisfies the requirements permitting the petition to go forward. See, 28 U.S.C., § 2244(b)(2)(A); McClesky v. Zant, 499 U.S. at 493-495; Teague v. Lane, 489 U.S. 288 (1989); Sanders v. United States, 373 U.S. at 17.

33. A Supreme Court decision that merely applies a "well established principle" to a new set of circumstances always is applied retroactively on collateral review. Yates v. Aiken, 484 U.S. 211, 216 (1988); see, Teague v. Lane, 489 U.S. at 301, 311-312.

34. The central issue presented for review is predicated squarely on the claim of actual ineffective assistance of (trial and) appellate counsel. Each failed to either object, or raise the significant and obvious claims surrounding the unconstitutional nature of the guilty plea being taken based on a waiver of petitioner's right or privilege without his knowledge or consent, a waiver that would have a direct consequence on the voluntary nature of the guilty plea and the sentencing, a consequence petitioner is never advised of or an objection lodged against by his first attorney, nor informed of by the Court during the allocution, prior to, during or after the guilty plea's acceptance; as well as, the due process error of the Sentencing Court in not lawfully considering petitioner for youthful offender treatment upon a timely request. An issue the second retained counsel stated he would raise on appeal but did not unreasonably. Petitioner's New York State conviction became final in 1976 when leave to appeal to the New York State Court of Appeals is denied. Appendix "G". As a pro-se. litigant, petitioner did not seek or knew how to file for certiorari to the United States Supreme Court; and was not informed about appealing to the Second Circuit Court the district court's denial of habeas relief initially.

35. The Strickland standard was announced in 1984. Strickland v. Washington, 466 U.S. 668; see, Evitts v. Lucey, 469 U.S. 387 (1985); People v. Stultz, 2 N.Y. 3d 277, 282, 283 (2004). The Strickland standard, as a "new" rule of constitutional procedural law, would satisfy the requirements under either the Teague or the Sanders exceptions. See, 28 U.S.C., §2244(b)(2)(A); Teague v. Lane, 489 U.S. at

307, 311; Sanders v. United States, at 17. As an "intervening" or "watershed" rule of law as held by Sanders, the Strickland standard would require accepting the instant petition for merit review in a post, collateral habeas setting such as this. See, Teague v. Lane, 489 U.S. at 312; Kimmelman v. Morrison, 477 U.S. 365, 365, 371 (1986); Sanders v. United States, supra. Thus, whether the Strickland standard or its progeny are characterized as a "new law", or "old law", the Strickland standard would certainly be applied retroactively to this petition. See, Teague v. Lane, 489 U.S. at 311; Kimmelman v. Morrison, 477 U.S. at 371; Sanders v. United States, 373 U.S. at 12; Graham v. Hoke, 946 F.2d 982, 992-994 (2nd. Cir., 1991); Han Van Nguyen v. Curry, 736 F.3d 1287. 1293-1294 (9th. Cir. 2013).

b. *The McClesky v. Zant Exception*

36. In petitioner's case, "'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court", is the cause for this second petition. McClesky v. Zant, 499 U.S. 467, 494 (1991), (quoting, Murray v. Carrier, 477 U.S. 478, 488 (1986); see, 28 U.S.C., § 2244(b)(1)(A); § 2254(d)(1); Sutton v. Carpenter, 745 F.3d 787, 791-792 (6th Cir., 2014); Han Van Nguyen v. Curry, 736 F.3d. at 1294-1295.

37. Here, governmental interference made "compliance with the State's procedural rule impracticable". McClesky v. Zant, supra; see, Trevino v. Thaler, 569 U.S. 413 (2013); Martinez v. Ryan, 566 U.S. 1 (2012).

38. In the seventies the Supreme Court, had not rendered a decision that "clearly established" the standard that now governs a claim of actual ineffective assistance of counsel, (IAC). See, Strickland v. Washington, 466 U.S. at 671. There were various IAC standards employed by the State and Federal courts during this period. See, e.g., Trapnell v. United States, 725 F.2d 149, 155 (2nd. Cir., 1983); People v. LaBree, 34 N.Y. 2d 257 (1974).

39. In 1975, New York Courts, for instance, applied a "farce and mockery", or "reasonable competence" standard to review trial-type, actual IAC claim — which had not yet been clearly established by the Supreme Court. See, Strickland v. Washington, 466 U.S. at 607; McMann v. Richardson, 397 U.S. 759, 770, 771, n. 14 (1970). Nor was there any state acceptable standard, procedure or forum available for raising IAC claims against counsel on appeal in 1975. See, People v. Stultz, 2 N.Y.3d at 281; People v. Bachert, 69 N.Y. 2d 593, 595 (1987). It would have been futile to have pursued the IAC appellate claim in 1975, as state and federal law was not clearly established by the Supreme Court, amongst the other objective factors external to impeding petitioner's defense of presenting this claim until now. See, Panetti v. Quarterman, 551 U.S. 930, 947 (2007); Gutierrez v. Smith, 702 F 3d. 103 (2nd. Cir., 2012).

40. Indeed, although New York State Courts at the time did permit, it did not require the convicted person the right to raise an appellate IAC claim on direct appeal, state procedural law—either expressly or as a function of the structure and design of such law—required that a petitioner initially raise an ineffective-assistance-of-

trial-counsel claim in a state collateral review proceeding or made it "virtually impossible" to raise such a claim in any other way. Trevino v. Thaler, 569 U.S. at 416; see, id., supra, 569 U.S. at 428; Martinez v. Ryan, 566 U.S. 1, 18 (2012).[2]

41. In actual operation, however, New York's 1975 Criminal Procedure Law, made it almost impossible for an appellate counsel claim of IAC to be presented adequately on direct review. See, Knowles v. United States, 2022 WL 999078 (S.D.N.Y., March 30, 2022), at *16, n. 15; People v. Bachert, 69 N.Y. 2d at 596-597; People v. Brown, 45 N.Y. 2d. 852, 853-854 (1978). The fact appellate counsel was retained and not appointed is a distinction without a difference. See, Evitts v. Lucey, 469 U.S. at 395-396. Such governmental interference is the cause that impeded presentment of the claim until now. Trevino v. Thaler, 569 U.S. at 416; Martinez v. Ryan, 566 U.S. 1, 18.

c. *Unavailability of the Factual or Legal basis for the Claim*

42. Sans the state records, the factual or legal basis for the IAC claims was unavailable to petitioner. McClesky v. Zant, 499 U.S. at 494; see, Strickler v. Greene, 527 U.S. 263, 283, n. 24 (1999), (citing Murray v. Carrier, 477 U.S. 478, 488 (1986). There are several reasons for this.

43. Attorney Hyman was the same attorney representing petitioner after the guilty plea, and upon the appeal. Although as appellate counsel he cannot have been expected to raise his own incompetence as such presented an inherent conflict of

[2] The Second Circuit Court has yet to decide whether the Trevino-Martinez, standard would apply under New York law. See, Ford v. Smith, 2016 WL 7647042 (S.D.N.Y., August 8, 2016), at *12, n.13.

interest, see, Massaro v. United States, 538 U.S. at 502-503, 508 (2003); Boomer v. United States, 162 F.3d 167 (2nd. Cir. 1998); Mendoza v. Stephens, 783 F.3d 203, 207, n. 21 (5th Cir. 2015); Alston v. Garrison, 720 F.2d 812, 816 (4th Cir. 1983); he, nonetheless, could have raised reasonably trial attorney Sackett's ineffective assistance. See, Hill v. Lockhart, 474 U.S. 52, 56, 58-59 (1985); Evitts v. Lucey, 469 U.S. 387, 395-396; McMann v. Richardson, 397 U.S. 759, 770, 771. n. 14 (1970); Lynch v. Dolce, 789 F. 3d 303, 311-312 (2nd. Cir. 2015); but, see, Massaro v. United States, 538 U.S. at 506.[3] In this respect, the "procedural default is the result of ineffective assistance of counsel [; and as such] the Sixth Amendment itself requires that responsibility for the default be imputed to the State." It is an "external factor." Coleman v. Thompson, 501 U.S. 722, 754 (1991).

44. Petitioner did not learn of the reasonable unavailability of the facts surrounding the IAC claim until 2007. Thereafter, he diligently moved to be heard in the state post-conviction courts for collateral relief until he exhausted all available legal avenues to no avail. See, e.g., Appendix "J"; "P". There are several good cause explanations justifying the delay in not filing for additional federal relief until now.

45. Petitioner's earlier correspondence to the respondent went unanswered. In then seeking formally the transcripts by means of a pro-se, post-conviction motion,

[3] As demonstrated in the Plea, Withdrawal and Sentencing transcripts of this case, trial counsel Sackett would not accept phone calls, speak to or disclose the records to attorney Hyman during this period. See, Appendix, "D"; "E".

petitioner is informed by the Bronx District Attorney's Office that such documents "no longer exist." See, A.D.A., Bryan C. Hughes' Affirmation In Opposition, [to the C.P.L., § 440.10 motion], (August 7, 2007), at p.3, ¶ 6, fn. 2; Gutierrez v. Smith, 702 F.3d. 103, 111-112 (2nd. Cir., 2012).

46. Although petitioner had made past inquiries to appellate counsel asking for information or the records of this case, correspondences which were not answered; it was not until some 37 years later that appellate counsel responded and turned over the requested documents in 2007.[4]

d. *Jurisdictional Custody*

47. Under the prevailing standards, Petitioner's application for a Second/Successive petition satisfies the requirements for, "a district court [to] entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court on the ground that he is in custody in violation of the Constitution . . . of the United States." 28 U.S.C., § 2254(a); see, 28 U.S.C., § 2241(c) (3); 28 U.S.C., § 2244 (b), (c); 28 U.S.C., § 2254 (a). In this case, in each instance, Petitioner has, under State law, remained in custody serving the aggregated sentences and will continue to do so until all sentences are served. Garlotte v. Fordice, 515 U.S. 39 (1995); see, New York Penal Law, (P.L.), § 70.25; § 70.30.

[4] Many, if not all the letters and correspondence sent to appellate counsel and respondent accumulated by petitioner regarding the 1975 conviction was loss or destroyed in transit by the Department of Corrections and Community Supervision, (D.O.C.C.), Presently petitioner is suing in the Court of Claims for the loss or destruction of his legal property.

48. In 1975, petitioner was convicted and sentenced as a first-time felony offender to an indeterminate term of imprisonment of 5-15 years after a plea of guilty. See, New York's Penal Law, (P.L.), §§ 70.02; 70.35. appendix "D"; "E". While still in custody serving the 1975 sentence, he is convicted and sentenced in 1986 after a jury verdict to a consecutive, indeterminate term of imprisonment of 12½ to 25 years as a second, violent felony offender. See, P.L., §§ 70.04; 70.35. While in custody serving both aforementioned consecutive sentences, petitioner is convicted and sentenced after a jury verdict in 2007, to a consecutive, indeterminate term of imprisonment of 150 years to life, as a persistent, violent felony offender. See, P.L., §§ 70.08; 70.35. In each instance Petitioner has remained in custody and continues to remain in custody on each consecutive sentence until all the aggregated sentences are served. Garlotte v. Fordice, 515 U.S. at pp. 41; see, Peyton v. Rowe, 391 U.S. 54 (1968); Smalls v. Batista, 22 F. Supp. 2d. 230 (S.D.N.Y., 1998); aff'd., 191 F. 3d 272, 276-277 (2nd. Cir., 1999); P.L., § 70.25; § 70.30.

49. In Garlotte v. Fordice, the Supreme Court relying on the reasoning in Peyton v. Rowe, held that, "the governing federal prescription permits prisoners incarcerated under consecutive state court sentences to apply for federal habeas relief from sentences they had not yet begun to serve." Garlotte v. Fordice, 515 U.S. at p. 40. Petitioner, as would be found in Peyton, is under consecutive, State sentences. See, Peyton v. Rowe, 391 U.S. at 64-65. However, dissimilar to Peyton, petitioner in this instance, is not seeking to challenge an underlying sentence yet

to be served; but is attacking a conviction underlying the sentence that ran first in the consecutive series of sentences. A sentence already served but none-the-less persist to postpone petitioner's eligibility for parole. It is in that respect that disaggregating petitioner's sentences is unconstitutional for jurisdictional, "in custody" purposes. Garlotte v. Fordice, 515 U.S. at p. 41; see, See, P.L., §§ 70.25; 70.30. The Garlotte Court makes clear that such aggregated sentences must be viewed "as composing a continuous stream." Id. Put another way, "a prisoner serving consecutive sentences is 'in custody' under any one of them' for purposes of the habeas statute." Id., at pp. 45-46. So, as Garlotte and Peyton would find, Petitioner, in this case, may attack the underlying 1975 sentences in a habeas suit that was scheduled to run first in the series of consecutive sentences. Id.

50. Unlike the Maleng v. Cook, [490 U.S. 488 (1989)], and the Lackawanna County Dist. Attorney v. Coss., [532 U.S. 394, (2001)], determination, the Garlotte and Peyton decisions are distinguished and rendered inapplicable for several reasons. Petitioner is not raising a challenge to the 2007 sentence based on its enhancement by the 1975 sentence alleged unconstitutional. Maleng v. Cook, 490 U.S. at p. 493; Lackawanna County Dist. Attorney v. Coss., 532 U.S. at 403-404. Nor is this a case in which petitioner is serving a federal sentence, with a State detainer warrant waiting in the wings to be served upon completion of the federal sentence. Id. Finally, neither "the *Garlotte* or *Peyton* Court give any indication that the fact that the sentences were imposed on the same day, or resulted from the same events, was a factor, or proved dispositive in those decisions". Smalls v.

Batista, 22 F. Supp. 2d. 233. Moreover, unlike petitioner's case, the Maleng Court is addressing but rejecting the interpretation of "in custody" as to the potential use of an expired sentence--- a collateral consequence of the sentence--- as a future enhancement, permitting federal jurisdiction to hear a petition for a writ of habeas corpus. Garlotte v. Fordice, 515 U.S. at pp. 45-46; Maleng v. Cook, 490 U.S. at p. 492.

51. All sentences imposed by the Courts against petitioner were rendered consecutively to be served in one of its State, correctional facilities until all are served. See, 28 U.S.C., § 2254(a); 28 U.S.C., § 2241(c)(3); Garlotte v. Fordice, 515 U.S. at 41; compare, Maleng v. Cook, 490 U.S. at 490-491, 493.

52. It is for these reasons that Petitioner has satisfied the requirements necessary for a habeas court to hear and determine the instant petition. See, 28 U.S.C., § 2254(a); see, 28 U.S.C., § 2241(c)(3); 28 U.S.C., § 2244 (b), (c); Garlotte v. Fordice, 515 U.S. at 45-46; Smalls v. Batista, 22 F. Supp. 2d. 230 (S.D.N.Y., 1998); aff'd., 191 F. 3d 272 (2nd. Cir., 1999); Young v. Vaughn, 83 F.3d 72 (3d. Cir 1996); Bernard v. Garraghty, 934 F. 2d. 52, 54 (4th. Cir., 1991).

e. ***Prima Facie Established***

53. Based on the foregoing, the petition has made a prima facie showing of a sufficient likelihood satisfying the strict standards for relief by means of a writ habeas corpus. 28 U.S.C., §§ 2244 (b)(3)(c); 2254 (d); Bell v. United States, 296 F.3d 127, 128 (2nd. Cir., 2002); Keith v. Bobby, 551 F.3d 555, 556 (6th. Cir., 2009). A reasonable fact-finder would have found the ineffective assistance of appellate

counsel claim surrounding his failure to raise an obvious and significant but omitted involuntary guilty plea issue, "warrant[s] a fuller explanation by the district court." Id.; see, McClesky v. Zant, 499 U.S. at 494; Evitts v. Lucey, 469 U.S. at pp. 396-397; Strickland v. Washington, 466 U.S. at 686, 694; Mayo v. Henderson, supra; In re Moss, 703 F. 3d 1301 (11th. Cir., 2013).

54. Petitioner therefore contends that abundant grounds thereby exists for the exercise of this Court of its original jurisdiction to grant a writ of habeas corpus, since the error of the court of appeals, as well as the district court, in denying relief, renders further recourse to those courts, as well as orderly procedure of this Court by way of petition for a writ of certiorari, being closed to your petitioner. See, U.S. Sup. Ct. Rule, Rule 20.4(a); Felker v. Turpin, 518 U.S. 651 (1996); id., 518 U.S. at 666, (Souter, Stevens, Breyer, JJJ., concurring), ("The question could arise if the court of appeals adopt divergent interpretations of the gatekeeper standards.")

55. Petitioner asks leave to file with this Court, as part of, and in support of this petition, the original sworn petition for a writ of habeas corpus, as had been filed in the district court and denied by that court, which is on file with the District Court, as well as two copies of the original petition, which copies are filed for convenience with this Court. The original petition, now amended, contains, in addition to the grounds stated under paragraphs 3 and 4, the following additional constitutional claim.

2. *Ineffective Assistance of Counsel*

56. Appellate counsel rendered ineffective representation in failing unreasonably to present significant and obvious issues on the first-tier appeal as of right.

57. Appellate counsel filed a one claim appellate brief, consisting of twenty-three pages. The two sub-issue encompassed therein challenged Judge Quinn's improvident exercise of discretion in denying petitioner the right to retain counsel of choice on the eve of trial, and the coercive effects it had on the resulting guilty plea's involuntariness. See, Appendix "F".

58. Counsel, however, rendered ineffective representation in omitting unreasonably the significant and obvious issues available for inclusion with, or would have served reasonably as a more meritorious substitution then the clearly weaker issues presented. The omitted issues are:

a. formerly retrained counsel and the Court's waiver of an eligible petitioner's statutory right or privilege without his knowledge, notice or informed consent that would be a direct consequence as to the voluntariness of the guilty plea and sentence entered, and;

b. formerly retained counsel and the Court's failure to advise, object to, or inform petitioner prior to during, or after the initiation and acceptance of the guilty plea, of all direct consequences made a condition of the resulting non-informed, nor consented to waiver of a statutory right or privilege, and;

c. the Court's due process violation in refusing to consider an eligible petitioner's lawful and timely move for Youthful Offender adjudication on an

erroneous belief such a statutory right or privilege had been lawfully waived away prior to the sentencing.

59. Under either a Cause and Prejudice test that excuses a procedural default, or an independent ground for habeas relief under a pre or post AEDPA standard of review, the cause of counsel's error by itself so infected the entire trial that the resulting convictions violates due process and, but for counsel's unprofessional errors, the result of the proceeding would have been different. As such, the petition demonstrates the denial of the Sixth Amendment guarantee of the right to the effective assistance of counsel on direct appeal, and should be heard for habeas merit relief. See, McClesky v. Zant, 499 U.S. at 494-495; Hill v. Lockhart, 474 U.S. at 58-59; Evitts v. Lucey, 469 U.S. at 395; United States v. Frady, 456 U.S. 152, 169 (1982); McMann v. Richardson, 397 U.S. at 771.

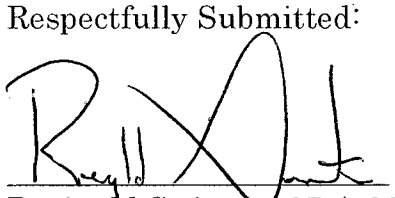
60. The foregoing matters are so voluminous that your petitioner is unable to bear the expense of printing them all as part of this petition, mailing them both to this Court and Respondent. Moreover, to print them would make this petition unduly voluminous and burdensome. For the convenience of the court, however, and because respondent already have all the state records and documents pertaining to the challenge of the 1975 conviction as relied on in prior state and federal pleading challenging the constitutionality of the state's 1975 guilty plea conviction and sentence, petitioner will serve respondent with an appendix list of the documents sent to this Court in support of the petition. See, Appendix "N"; "O".

CONCLUSION

61. Wherefore, by reason of the foregoing claims, petitioner prays that a writ of habeas corpus issue from this Honorable Court, to be directed to Walter Fogg, Superintendent of the Greenhaven Correctional Facility, County of Dutchess, State of New York, aforesaid, and whomever may hold your petitioner in custody, (presently, Stacie Bennett, Acting Superintendent, Sullivan Correctional Facility, Sullivan County, the State of New York), commanding him/her and them to have the body of your petitioner before this Honorable Court, at a date fixed by the Court, for the purpose of inquiring into the cause of the commitment and detention of your petitioner, and to do and abide such order as this Court may make in the premises.

Your petitioner further prays this Court that thereupon your petitioner shall be granted forma pauperis relief; appointment of counsel, and a writ of habeas corpus, vacating and discharging petitioner from custody of the 1975 conviction; and for such other and further relief this Court may deem just and fair.

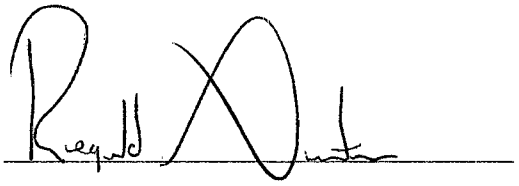
Respectfully Submitted:



Reginald Swinton, 07-A-3279
Sullivan C.F.
325 Riverside Drive
P.O. Box 116
Fallsburg, New York 12733-0116

REGINALD SWINTON, petitioner, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition, that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters where are therein stated on his information and belief and as to those matters he believes them to be true.



REGINALD SWINTON, 07-A-3279